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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONNA ERICKSON,

Petitioner,

vs.

PIERCE COUNTY and JOHN LADENBURG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Published Opinion Of The Ninth Circuit In The Instant Case Substantially Limited The Kinds Of Circumstantial Indicia Of Unlawful Motions In Cases Where Public Employee's Have Alleged That Their Employment Was Terminated For Reasons Violative of First Amendment Rights?

2. Whether The Supreme Court Will Examine And Clarify What Kinds and Quantities of Circumstantial Evidence Must Be Produced In Order to Sustain A Jury's Verdict That A Public Employee Has Been Terminated For Unlawful Reasons.

3. Did the Ninth Circuit Misapply The Standards For Granting Judgment Notwithstanding The Verdict By Reweighing the Evidence and Ignoring Competent Circumstantial Evidence Upon Which The

Jury Could Have Rested Its Verdict?

4. Was Petitioner Denied Her Seventh Amendment Right To A Jury Trial By the Circuit Court's Reversal of The District Court's Denial Of A Motion For JNOV?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedure 3

B. Facts. 5

C. The District Court's Decision. 9

D. The Court of Appeals' Decision. 9

REASONS FOR GRANTING THE WRIT 12

1. The Decision Of The Ninth Circuit Conflicts With The Decisions Of This Court, Its Own Opinions And That Of Other Circuits and This Case Presents An Important Question Concerning The Quality And Kinds of Circumstantial Evidence Available To A Public Employee Who Has Allegedly Been Terminated By Her Public Employer For Reasons Violative Of Her First Amendment Rights. 12

2. The Opinion Of The Circuit Court Misapplied The Standards For Granting Judgment Not Withstanding The Verdict And Violated Petitioner's Seventh Amendment Right To A Jury Trial. 28

CONCLUSION 34

APPENDIX 1 . . . . . 1a-21a

APPENDIX 2 . . . . . 22a-23a

APPENDIX 3 . . . . . .24a-25a

TABLE OF AUTHORITIES

Cases

Page

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 13

Anthony v. Sundlun, 952 F2d 603, 606 (1st Cir. 1991) 27

Baylis v. Traveler's Ins. Co., 113 U.S. 316 (1885) 29

Branch v. Ogilvy & Mather Co., 772 F.Supp. 1359, 1362 (S.D.N.Y. 1991) 31

Branch v. Tunnell, 937 F2d 1382, 1387 (9th Cir. 1991) 33

City of Monrovia, 775 F2d 998, 1008-09 (9th Cir. 1985) . . . 13

Cohen v. Fred Meyer, 686 F2d 793, 797 (9th Cir. 1982) 18

Connell v. Sears, Roebuck & Co., 722 F2d 1542 (Fed. Cir. 1983) . . 28

Conway v. Electro Switch Corp., 825 F2d 593, 600 (1st Cir. 1987) . . 20

Elrod v. Burns, 427 U.S. 347, 359 (1976) 14

Garvin v. Greenback, 856 F2d 1392, 1396 (9th Cir. 1988) 28

Giacoletto v. Amax Zinc Co., Inc., 954 F2d 424, 425-26 (7th Cir. 1992) 25

Gillette v. Delmore, 886 F2d 1194, 1197 (9th Cir. 1989) 15

Grafenhain v. Pabst Brewing Co., 827 F2d 13, 22 (7th Cir. 1987) 17,26

Hudson v. Normandy School Dist., 953 F2d 410, 413 (8th Cir. 1992) 23

Jones v. Dodson, 727 F2d 1329 (4th Cir. 1984) 24

Laidley v. McClain, 914 F2d 1386 (10th Cir. 1990) 19,20

Marley v. City of Allentown, 774 F.Supp. 343, 344 (E.D. Pa. 1991) 31

Mays v. Williamson and Sons Janitorial Services, Inc., 775 F2d 258, 259 (8th Cir. 1985) 21

Meyers v. City of Cincinnati, 934 F2d 726, 729 (6th Cir., 1991) . 21

Missouri Education Association v. New Madrid County R-1 School Dist., 810 F.2d 164, 167 (8th Cir. 1987) 13

Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977) 15

Ortega v. Schramm, 922 F2d 684, 695 (11th Cir. 1991) 31

Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982) 13

Price Waterhouse v. Hopkins, ___ U.S. ___ 1095 Ct. 1775 (1989). 24

Rinker v. County of Napa, 831 F2d 829, 831 (9th Cir. 1987) 31

Schwartzman v. Valenzuela, 846 F2d 1209, 1212 (9th Cir. 1988) . . 15

Sifers Corp. v. Arizona Bakery Sales Co., 133 FRD 607, 608 (D. Kan. 1991) 31

Soderbeck v. Burnett County, Wis., 752 F2d 285 (7th Cir. 1985) . . 21

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) 26

Thomas v. Carpenter, 881 F2d 828 (9th Cir. 1989) 24

Tye v. Polaris Joint Voc. Sch. Dist., 811 F2d 315, 319 (6th Cir. 1987) 27

U.S. v. Lesher, 56 F2d 53, 54 (9th Cir. 1932) 29

U.S. Postal Serv. Bd. of Governor's v. Aikens, 460 U.S. 711, 716-17 (1983) 11

U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711, 716-17 (1982) 13

Verdegall Bros. Inc. v. Union Oil, 814 F2d 628, 631 (Fed. Cir. 1987) 30

Walther v. Lone Star Gas Co., 952 F2d 119, 124 (5th Cir. 1992) . . 22

Yartzoff v. Thomas, 809 F2d 1371, 1376 (9th Cir. 1987) 15

Statutes and Constitutional Provisions

28 USC Sec. 1254(1) 2

28 USC Sec. 2101(c) 2

42 USC Sec. 1983 2,3

42 USC Sec. 1988 4

Superior Court Rule 13(4) 2

NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

DONNA ERICKSON,

Petitioner,

vs.

PIERCE COUNTY and JOHN LADENBURG,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner Donna Erickson respectfully prays that a certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The decision of the Court of Appeals

for the Ninth Circuit as amended is reported at 960 F2d 801 (9th Cir. 1992) and reproduced as Appendix 1.

STATEMENT OF JURISDICTION

(i) The decision of the Court of Appeals denying rehearing was issued on July 1, 1992. See Appendix 2.

(ii) Jurisdiction is conferred on this Court by 28 USC Sec. 1254(1) and 28 USC Sec. 2101(c). This petition is timely under the terms of Superior Court Rule 13(4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution and 42 USC Sec. 1983, the pertinent text of while are set forth in

Appendix 3.

STATEMENT OF THE CASE

A. Procedure

Petitioner Donna Erickson brought this action under 42 USC Sec. 1983 against Pierce County and its elected prosecutor, John Ladenburg under 42 USC Sec. 1983, alleging that Ladenburg violated her civil rights by terminating her employment with the Pierce County prosecutor's office for reasons violative of her First Amendment rights.[1] Erickson claimed she had been

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[1]Other claimed violations were alleged including the denial of a property interest in her employment protected by the due process clause of the Fourteenth Amendment and that the manner in which the termination occurred denied her due process protected liberty interest. These claims were summarily dismissed by the

terminated from her employment because she was a political supporter of a William Griffies, Pierce County's former prosecutor who had been defeated by Ladenburg in a 1986 election.

After the denial of several summary judgment motions, the First Amendment (patronage claim) was tried with a jury before the Honorable Jack E. Tanner of the Western District of Washington at Tacoma. On March 20, 1989, the jury returned a verdict in petitioner's favor for $25,000.00. On April 28, 1989, the District Court ordered aa new trial limited to the issue of damages.

On January 2, 1990, a trial limited to damages was held. The jury returned a $75,000.00 verdict. In addition the

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District Court and are not the subject of this petition.

District Court awarded $109,925.50 in prevailing party attorney's fees pursuant to 42 USC Sec. 1988 and $5,992.84 in costs.[2] A timely Notice of Appeal was filed by Respondents.

B. **Facts.**

Donna Erickson was employed in the office of the Pierce County Prosecutor for approximately seven years. She began in June of 1980 as a records coordinator during the administration of a Don Herron, a democrat. She was promoted by him to the position of his administrative assistant. During this early stage of career on the personal side of her life she had become romantically involved with a local attorney named William Griffies.

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[2]Respondent's post-trial motion for a jury notwithstanding the verdict was denied.

By pure coincidence in 1982 William Griffies, a republican, was elected as Pierce County's prosecuting attorney. Mr. Griffies asked Ms. Erickson to maintain her role as his administrative assistant.

In 1986, Mr. Griffies lost his bid for reelection to John Ladenburg, a democrat. As part of Griffies unsuccessful campaign for reelection, Petitioner helped in his campaign by handing out literature, doorbelling and working at the republican party headquarters. She accompanied Griffies to rallies where both candidates were present. It was undisputed that Petitioner was a person closely identified both personally and professional with Griffies.

After his defeat, Griffies was concerned for Petitioner's job security.

To address these concerns, he transferred Ms. Erickson to a non-confidential and non-policy-making position within the offices Child-Support Enforcement department as a legal interviewer.

The transition from the Griffies administration to Ladenburg's was very difficult because Griffies refused to aid in the transition. Prior to taking office, Ladenburg was aware of the Erickson-Griffies relationship and had attended at least one "political meeting" with representatives of a potential key constituency (the Sheriff's Office) wherein Petitioner was a subject of discussion. Ladenburg recalled the attorneys for the Sheriff's Office had a negative appraisal of Ms. Erickson.

Once Ladenburg assumed office, he sought out Petitioner to assume limited

administrative assistant functions until he hired his own assistant. She also was to continue performing her regular job duties. At time of trial it was disputed as to whether Petitioner did or did not adequately or completely perform the requested duties. Shortly after Ladenburg hired his own administrative assistant and Petitioner's services were no longer essential, he terminated Petitioner's employment.

The reasons for termination related to Ms. Erickson's performance of administrative assistant functions and not those of her regular job duties as a legal interviewer. He gave her two weeks notice in advance of her final day on the job. Prior to termination, Petitioner had consistently received merit raise increases and annual evaluations with the

highest possible scores.

At the time of the first trial, both Ladenburg and Erickson testified about the events leading up to her discharge. The jury was duly instructed that Erickson had the burden of proving, her political beliefs and support was "a motivating factor" in the discharge decision. Based on the evidence before it and its determination of credibility issues, the jury found in Erickson's favor.

C. **The District Court's Decision.**

The District Court denied Respondents' motion for judgment notwithstanding the verdict and allowed the jury verdict finding Respondents liable for violating Petitioner's First Amendment rights to stand.

D. **The Court of Appeals' Decision.**

The Court of Appeals reversed and

held that Petitioner had failed to establish that her political support of Griffies was a substantial or a motivating factor in Ladenburg's decision to terminate her thus the District Court erred by not granting Respondents' motion for judgment notwithstanding the verdict.

In its opinion, the Appellate Court took at face value the alleged legitimate grounds for termination, but noted, "Erickson disputes the reasons cited by Ladenburg. She contends that her employment was terminated solely because she had supported Griffies during the 1986 election". After providing legal analysis of Petitioner's claim, the Court examined the circumstantial evidence presented by Petitioner yet in its conclusion denied Petitioner the benefit of the inference that could be derived therefrom:

> It is well established that a plaintiff need not prove allegations with direct evidence and that circumstantial evidence can be sufficient, U.S. Postal Serv. Bd. of Governor's v. Aikens, 460 U.S. 711, 716-17 (1983). Nonetheless, all of the above evidence merely suggests that Erickson was a Griffies supporter who was terminated, not that she was terminated because she was a Griffies supporter.

This conclusion was reached despite evidence relating to Petitioner's past superior performance, the temporal relationship of events, the attitude and relationship between the parties, and the underlying circumstances leading up to the termination. Apparently, the Court found it compelling that Petitioner, a non-lawyer, was unable on cross-examination to articulate how the circumstantial evidence related to her legal claim.

Petitioner sought rehearing and suggested en banc review. On July 1, 1992, the petition for rehearing was

denied and suggestions for a rehearing en banc was rejected. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Ninth Circuit Conflicts With The Decisions Of This Court, Its Own Opinions And That Of Other Circuits and This Case Presents An Important Question Concerning The Quality And Kinds of Circumstantial Evidence Available To A Public Employee Who Has Allegedly Been Terminated By Her Public Employer For Reasons Violative Of Her First Amendment Rights.

The instant matter was the most basic of jury cases in an area of the law where the Ninth Circuit and other federal courts

have repeatedly found that the ultimate issues of fact are for a jury to resolve. See e.g. Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987); Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982). In the past it has been recognized that when an employer's unlawful motive is at issue, the aggrieved employee may prove his or her case by both direct and circumstantial evidence. See U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711, 716-17 (1982). The liberal allowance for the use of circumstantial evidence is due to the self-evident proposition that unlawful motives are seldom admitted. See Missouri Education Association v. New Madrid County R-1 School Dist., 810 F.2d 164, 167 (8th Cir. 1987). See also, City of Monrovia, 775 F2d 998, 1008-09 (9th Cir. 1985) (Issue of employer's motivations a pure

question of fact).

While the Circuit Court's opinion at page 805 recognizes these basic propositions, its factual analysis and conclusions therefrom has the affect of sub silentio overruling a vast body of precedent that previously provided guidance for the practitioner and consistency in the manner in which such cases are proved at time of trial.

The Petitioner's case rested on the proposition that her employment was terminated due to her political beliefs in violation of her First Amendment rights. See, Elrod v. Burns, 427 U.S. 347, 359 (1976). The basis for the reversal of the jury verdict and dismissal of the case was that she failed to prove that such beliefs were "a substantial or a motivating factor" in the discharge decision. See,

Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977). It cannot be disputed that this particular question of motivation is a factual issue. Gillette v. Delmore, 886 F2d 1194, 1197 (9th Cir. 1989). Yet, in reversing the jury's verdict, the Circuit Court at 805 simply dismisses evidence that previously has been found probative in other cases and sufficient to create a jury question as to the issue of motivation.

It has long been recognized that the temporal relationship between protected activity and an adverse employment decision in and of itself is sufficient to create a jury question as to retaliatory motivations. See, Schwartzman v. Valenzuela, 846 F2d 1209, 1212 (9th Cir. 1988); Yartzoff v. Thomas, 809 F2d 1371, 1376 (9th Cir. 1987). In the instant

case, the Circuit Court at page 805, notes the evidence established that shortly after assuming office and his hiring of a person who could perform the basic functions that Erickson was performing, Erickson's employment was terminated. It is suggested that it was within the jury's prerogative to believe that as soon as it became reasonably convenient following her protected activities, Ladenburg eliminated her employment. Is it now to be understood that this form of evidence is no longer available to person's subject to an unlawful employment decision.

It was clear from the record below that Erickson was viewed as a quality employee who in the past had been consistently promoted and had received superior performance ratings. In Schwartzman, supra, and other cases, it

has been recognized that it is "strong circumstantial evidence" that a retaliatory motive is operating when a previously well respected employee is terminated after engaging in protected conduct. See also, Grafenhain v. Pabst Brewing Co., 827 F2d 13, 22 (7th Cir. 1987). Are we now to understand that an employee's past superior performance is no longer a relevant consideration when engaging in a motivational inquiry?

As noted in Grafenhain, at page 20, when indirect proof is being utilized no one pierce of evidence alone need support a finding of unlawful intent, but rather the entire circumstances must be viewed as a whole. Beyond the facts above, the record in the instant case is literally replete with other circumstantial evidence of unlawful motive that apparently were

dismissed as insignificant by the deciding panel.

In the instant case, Ladenburg was aware of Erickson's protected conduct and of her close personal and political affiliation with his political rival. See, Cohen v. Fred Meyer, 686 F2d 793, 797 (9th Cir. 1982). Ladenburg admitted that Erickson was a subject of discussion with representatives of a politically key constituency, the local sheriff's office, who had a negative opinion of Erickson. The transition between Ladenburg and the defeated incumbent, who Erickson was closely identified with, was not friendly. Ladenburg conceded that any problems he may have had with Erickson was the by-product of the "emotionalism" of the election (assuming the jury believed he had any "problems" with her). Ladenburg

fired Erickson without consulting her direct supervisors and without evaluating her performance in the job she was then assigned to perform. Erickson received no notice of performance deficiencies prior to termination and at trial it was within the jury's prerogative to believe that the "reasons for termination" were nonexistent or trivial.

When analyzing such facts in relation to existing case law, it is clear that they have in the past been deemed sufficient to support submitting a case to a jury. The panel's opinion is a radical departure from precedent. In Laidley v. McClain, 914 F2d 1386 (10th Cir. 1990), another political termination case the Court found sufficient facts to support a claim where the evidence showed that the plaintiff therein was a supporter of a

political opponent who, after a bitter election campaign was fired by the winning candidate even though she had previously been an above average employee with no disciplinary history. The Laidley case at 1394 noted that all the circumstantial evidence had to be viewed in the context of a bitter political campaign. In other words, it is significant and entirely proper for a fact finder to consider the atmosphere in which the termination decision was made. See also, Conway v. Electro Switch Corp., 825 F2d 593, 600 (1st Cir. 1987). In the instant case, it was entirely proper for the jury to view the surrounding circumstances and determine that more likely than not Erickson was a victim of politics and that her termination was predictable.

Ladenburg's view of Erickson and his

attitude towards her are also significant factors overlooked by the Court. See, Meyers v. City of Cincinnati, 934 F2d 726, 729 (6th Cir., 1991). In Ladenburg's view he had a "problem" with Erickson because of the "emotionalism of the election" while Erickson testified she performed all the tasks she was asked to perform. Ladenburg also indicated he kept Erickson under scrutiny when, at a staff meeting, he was introducing new policies. See, Mays v. Williamson and Sons Janitorial Services, Inc., 775 F2d 258, 259 (8th Cir. 1985).

In the similar political termination case of Soderbeck v. Burnett County, Wis., 752 F2d 285 (7th Cir. 1985), the Court found the relationship between the fired employee and the defeated political candidate sufficient to create a jury

question. In that case there was a marital relationship. In this case it was a long-term romantic relationship. In these modern times this would not seem to be a distinction that should make a difference.

The manner and so-called reasons for Erickson's termination were also probative of whether or not her dismissal was based on an improper motive. In Walther v. Lone Star Gas Co., 952 F2d 119, 124 (5th Cir. 1992), the Court noted that, as in the instant case, a jury would be entitled to find a termination decision suspect when the employee's personnel file was not examined and his immediate supervisor not consulted by the person who made a termination decision. Further, it has been found that when a long-time employee is terminated for what are arguably

trivial or minor infractions of work rules, it is for the jury to determine underlying motive. See, Hudson v. Normandy School Dist., 953 F2d 410, 413 (8th Cir. 1992).

In the instant case, the so-called reasons for termination were such petty and amorphous offenses as poor attitude, moving phone lines and files, poor performance in duties she was not being paid to perform, and causing morale problems. As noted at page 804 of the Circuit Court's opinion, Erickson disputed the legitimacy of Ladenburg's so-called reasons and as discussed below, it was the province of the jury to assess credibility and after determining these so-called legitimate reasons were pretextual, conclude Erickson's political beliefs were

the true reason for termination.[3]

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[3] At 805, the panel notes Erickson was contending she was terminated "solely" because of her political beliefs. This term is repeated at page 3052 of the opinion. This is not the standard that has been applied by the Circuit Courts in First Amendment political termination cases nor an accurate reflection of Erickson's contentions. See, Jones v. Dodson, 727 F2d 1329 (4th Cir. 1984); Thomas v. Carpenter, 881 F2d 828 (9th Cir. 1989). As these cases indicate, when a case involves contentions of potentially legitimate and illegitimate reasons for termination, it is a "mixed motive" case and "a substantial or a motivating factor" test applies. See, Price Waterhouse v. Hopkins, ___ U.S. ___ 1095 Ct. 1775 (1989). As shown by Price Waterhouse at

As noted in the recent opinion of Giacoletto v. Amax Zinc Co., Inc., 954 F2d 424, 425-26 (7th Cir. 1992), there are several methods of proving whether an employment decision has been predicated on an improper motive. On application of a

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page 1787-91, such a burden of proof is significantly lower in that a plaintiff does not have to show a single impermissible reason was determinative, but rather a plaintiff need only show an impermissible reason played a part in the adverse decision. It is respectfully suggested that to the degree a "sole reason" analysis was applied by the panel, it was erroneous and served to improperly heighten Plaintiff's burden of proof. It is further suggested that such language is bound to create confusion that will require clarification in the future.

pretext analysis to the facts of the instant case, it can be noted that once reasons for termination are placed into dispute, plaintiff can prove their case by showing that the decision more likely than not was based on an improper reason or that the proffered reasons are unworthy of credence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Such an inquiry largely rests on the credibility of the employer's explanation for its actions. See, Burdine at 256.

Should the reasons for termination be subject to rebuttal, the decision remains unexplained and it can be presumed that more likely than not it was based on an improper motive. See, Grafenhain v. Pabst Brewing Company, 827 F2d at 18. When untrue reasons are offered, an employee

may prove pretext by attacking the employer's motive for offering untrue reasons. Tye v. Polaris Joint Voc. Sch. Dist., 811 F2d 315, 319 (6th Cir. 1987).

It is disturbing the panel in its opinion emphasized Ladenburg's reasons for termination while ignoring Erickson's proof. It was the prerogative of the jury to conclude the so-called reasons for termination were false and were created as a subterfuge to cloak unlawful motivations. As shown by Anthony v. Sundlun, 952 F2d 603, 606 (1st Cir. 1991), Ladenburg's self-serving denials of impropriety should not be credited when a fact finder has considered such assertions and rejected them. As noted in Anthony, it is improper for an appellate court to disturb a verdict based on credibility made by a fact finder. On examination of

the standards applicable to the granting of a judgment not withstanding a verdict, it was clearly improper for the Court to disturb a jury verdict based on an assessment of credibility and the circumstantial evidence discussed above.

2. The Opinion Of The Circuit Court Misapplied The Standards For Granting Judgment Not Withstanding The Verdict And Violated Petitioner's Seventh Amendment Right To A Jury Trial.

The standards for the granting of a judgment notwithstanding the verdict are set-forth in Garvin v. Greenback, 856 F2d 1392, 1396 (9th Cir. 1988).[4] On

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[4] The recognized standards for JNOV are co-extensive with the requirements of the Seventh Amendment to the U.S. Constitution. See, Connell v. Sears,

application of such standards the Appellate Court applies the same standard as the District Court and must construe the evidence in a manner most favorable to the non-moving party. Id. JNOV is proper only if the evidence taken as a whole can support only one reasonable conclusion

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Roebuck & Co., 722 F2d 1542 (Fed. Cir. 1983). (Due to the Seventh Amendment, a jury verdict must be given great difference). When Court supplants the fact finding function of a jury, the Seventh Amendment is violated. Baylis v. Traveler's Ins. Co., 113 U.S. 316 (1885); see also U.S. v. Lesher, 56 F2d 53, 54 (9th Cir. 1932). It is suggested that the panel's failure to either recognize Erickson's evidence or its reweighing of the evidence in the record offended the Seventh Amendment.

that the moving party is entitled to relief from the verdict. (Emphasis added). Id. Neither the District Court nor the Appellate Court on such a motion is not free to weigh the evidence or reach a result it finds more reasonable if the jury verdict is supported by substantial evidence. Id.

Substantial evidence is more than a mere scintilla; it is relevant evidence taken from the record as a whole which a reasonable mind might accept as adequate to support a decision under review. Verdegall Bros. Inc. v. Union Oil, 814 F2d 628, 631 (Fed. Cir. 1987).

When reviewing a grant of JNOV, the possibility that a reasonable jury may have found in favor of a non-moving party is all that is necessary before a JNOV will be overturned. Ortega v. Schramm,

922 F2d 684, 695 (11th Cir. 1991). JNOV should be cautiously and sparingly granted only when a court is certain that the evidence conclusively favors one party and reasonable men would not arrive at a contrary conclusion. Sifers Corp. v. Arizona Bakery Sales Co., 133 FRD 607, 608 (D. Kan. 1991). JNOV of a jury verdict is only appropriate when a manifest injustice were to result if the verdict were allowed to stand. Marley v. City of Allentown, 774 F.Supp. 343, 344 (E.D. Pa. 1991). Determination of issues of credibility is out of place when considering a motion for JNOV. Branch v. Ogilvy & Mather Co., 772 F.Supp. 1359, 1362 (S.D.N.Y. 1991). See also, Rinker v. County of Napa, 831 F2d 829, 831 (9th Cir. 1987). When a JNOV of a jury verdict is at issue, it must be presumed the jury followed the

instructions of the Court. Id. (The propriety of the instructions was not raised in this appeal).

In the instant matter a manifest injustice has been done to Donna Erickson. She presented her case to a duly instructed jury and it presumptively found in her favor on issues of credibility and the substantial circumstantial evidence that she was wrongfully fired. The Circuit Court effectively substituted its judgment on these issues for that of the jury by reweighing the evidence and heavily discounting the evidence favoring Erickson.[5] It failed to recognize

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[5] By quoting a small portion of Plaintiff's testimony where she could not point to any direct evidence of an improper motive, ignored the large amount of other testimony relating to the

previously acknowledged indicia of improper motive. While a jury could have concluded that Erickson was simply a Griffies' supporter who was fired, it also would be reasonable for a jury to conclude

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circumstances surrounding the termination coming from both Ladenburg and Erickson. By essentially requiring a plaintiff unschooled in the law, to articulate the evidence that obviously is locked within the mind of a defendant is tantamount to unfairly requiring a plaintiff to personally prove her case without the aid of arguments and interpretation by counsel. It requires her to prove her case by direct evidence. A direct evidence requirement that the Ninth Circuit Court itself recently rejected in Branch v. Tunnell, 937 F2d 1382, 1387 (9th Cir. 1991).

she was fired because she was a supporter of Ladenburg's political opponent. The evidence made it very possible for a jury to find in Erickson's favor and it can only be concluded that the facts were construed against her on a cold written record with the Appellate Court resolving all issues of credibility adversely to her position.

The decision of the panel was unjust and unfair. It was not supported by the record before it and ignored well developed principles of law. It denied Erickson her Seventh Amendment rights by denying her a jury verdict supported by the evidence.

CONCLUSION

The opinion of the Ninth Circuit has substantially "muddied the waters" with regard to what kinds of circumstantial

evidence is available for victims of an unlawful termination from public employment. The published opinion either sub silentio overrules or calls into question literally dozens of Appellate Court and Supreme Court opinions addressing the kinds of circumstantial evidence available to prove that an employment decision was based on an improper motive. The opinion will create substantial confusion and serve to undermine predictability in an area of the law that was otherwise clearly established.

If the Ninth Circuit's opinion is allowed to stand unaltered, it will encourage government officials found liable for unlawful employment practices to appeal the sufficiency of jury verdicts based on circumstantial evidence. In a

macro-economic sense it has the potential of increasing defense driven costs of litigation. Prospects of post-verdict resolution will be undermined and justice delayed in an area where a plaintiff may have already suffered an interlocutory appeal. It can only serve to demoralize an already besieged civil rights plaintiff's bar.

The law affords jury verdicts some sanctity. The decision at issue did not. It is respectfully prayed that a writ of certiorari issues and that this case be subject to Supreme Court review.

Dated this 25th day of September, 1992.

Respectfully submitted,

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APPENDIX 1

Donna ERICKSON, Plaintiff-Appellee,

vs.

PIERCE COUNTY; John Ladenburg, Defendants-Appellants.

Donna ERICKSON, Plaintiff-Appellant,

vs.

PIERCE COUNTY, John Ladenburg, Defendants-Appellees.

Nos. 90-35212, 90-35228

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 6, 1992.

Decided March 27, 1992.

As Amended on Motion for Clarification

May 6, 1992

OPINION

HUG, Circuit Judge:

Erickson brought this action against Pierce County and her supervisor,

Ladenburg, alleging a claim for wrongful termination of her employment. The action was brought under 42 U.S.C. Sec. 1983. Erickson claims a violation of her constitutional rights under the First Amendment, asserting that her discharge was because of her political support for her former supervisor, whom Ladenburg had defeated in the election. She also claims that she was deprived of a liberty interest without due process because of damage to her reputation. The district court dismissed the due process claim on summary judgment, but permitted the First Amendment claim to go to the jury. Pierce County and Ladenburg appeal the judgment on the jury's $75,000 verdict and the award of $110,000 in attorney fees. Erickson cross-appeals the summary judgment on her due process claim. We

affirm the district court's summary judgment on the due process claim but reverse the judgment on the First Amendment claim. The district court jurisdiction is based on 28 U.S.C. Sec. 1343. Our appellate jurisdiction is based on 28 U.S.C. Sec. 1291.

The issues on appeal are (1) whether the jury verdict in favor of Erickson was supported by substantial evidence, and (2) whether the district court erred by dismissing Erickson's due process claim.

I.

Donna Erickson was employed in the office of the Pierce County Prosecutor for approximately seven years. She began as a records coordinator in June 1980, during the administration of Don Herron, but advanced to the position of administrative assistant in February 1981. She served in

that capacity throughout the term of William Griffies. Herron's successor. During the time Erickson worked as Griffies's administrative assistant, she maintained a personal relationship with him.

In 1986, Griffies ran for reelection against Ladenburg, and Erickson actively supported him during that campaign. Ladenburg, however, defeated Griffies in the election. When Ladenburg took office in January 1987, Erickson was still employed at the prosecutor's office. However, Griffies had moved Erickson to a position in the family support unit to provide her with more job security once Ladenburg took office. Griffies sought to ensure that Erickson would have continued employment with Pierce County when his tenure expired. At the time of the move,

Ms. Erickson was earning a $37,000 salary, which she retained after she changed jobs.

The transition from Griffies's administration to Ladenburg's was very difficult. Griffies refused to participate in efforts to coordinate the transition, and Ladenburg had to take office with no knowledge of day-to-day operations. To ease the transition, Ladenburg asked Erickson to help with the functions she had performed while working for Griffies. These services included signing on new employees, ordering supplies, assisting with payroll, and providing Ladenburg with employee lists and budget information.

According to Ladenburg, Erickson repeatedly failed to complete the tasks assigned to her and was openly critical of him in front of other employees.

Ladenburg also testified that Erickson had removed and kept files from the administrator's office without informing anyone that she had done so, had transferred the administrator's phone number to the office she used for her new job, and had taken and retained the checks and records from an account used by the prosecutor. In addition, Ladenburg received reports from other employees that Erickson was uncooperative and hostile towards the changes he was trying to implement.

In a letter dated March 6, 1987, Ladenburg terminated Erickson's employment. In the termination letter, Ladenburg cited the following reasons for his action:

1. Since January you have displayed a poor attitude toward

supervision by staff and have not fully cooperated in transition matters.

2. Transition work was hindered by your failure to properly list and register new employees.
3. Items such as extra hire lists and employee wage lists were not provided as requested or were incomplete.
4. The administrative offices had essential files and documents removed.
5. The phones for the administration offices were transferred, creating location problems.
6. You transferred to a position with lower responsibilities and yet kept your salary at a high

level that is unjustified for that position.

7. Your past position as administrative assistant and your relationship with employees causes continuing morale problems.

Erickson disputes the reasons cited by Ladenburg, she contends that her employment was terminated solely because she had supported Griffies during the 1986 election.

Erickson filed suit against Pierce County and Ladenburg in November 1987, asserting many claims, including violations of her First and Fourteenth Amendment rights. Prior to trial, all claims except the First Amendment claim were dismissed. Trial began on March 14, 1989. At the close of Erickson's case,

Pierce County moved for dismissal. That motion was denied. Pierce County renewed the motion after all parties had rested, but the second motion was also denied. The jury returned a verdict in favor of Erickson and awarded her $25,000 in damages. After the verdict was entered, Pierce County moved for judgment notwithstanding the verdict, and Erickson moved for a new trial on the issue of damages. The court denied Pierce County's motion, but granted Erickson's. The new trial on the issue of damages occurred on January 2, and 5, 1990, and the jury returned a verdict in favor of Erickson for $75,000. This appeal ensued.

II.

Pierce County claims that the evidence presented at trial was insufficient to support a verdict in

Erickson's favor. Challenges to the sufficiency of evidence, and the denial of a motion for judgment notwithstanding the verdict, are reviewed de novo to determine if the plaintiff's claims were supported by substantial evidence. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1013-14 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986). It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. Transgo, 768 F.2d at 1014; accord Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir. 1985) (directed verdict is "inappropriate if there is substantial evidence to support a verdict for the non-moving party"), cert. denied, 475 U.S. 1122 (1986).

Terminations that allegedly violate the First and Fourteenth Amendments are subjected to a three-part test to determine whether constitutional rights have been violated. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 247, 287, 97, S.Ct. 586, 576, 50 L.Ed.2d 471 (1977); Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989). First, the terminated employee must establish that the conduct at issue was entitled to constitutional protection. Second, the employee must prove that the constitutionally protected conduct was a substantial or motivating factor behind the termination. Third, once the terminated employee has established the first two elements, the employer must prove that it would have made the same decision to terminate even if the employee

had not engaged in the protected conduct. Mt. Healthy, 429 U.S. at 287, 97 S.Ct. at 576, Gillette, 886 F.2d at 1197. Although we find the first element of this test satisfied in the instant case, the second clearly was not. Consequently, we need not consider whether Ladenburg carried his burden of proving that he would have terminated Erickson even if she had not supported Griffies during the election.

Political association, by itself, is an insufficient reason to dismiss a public employee. Elrod v. Burns, 437 U.S. 347, 359, 96 S.Ct. 2673, 2687, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 515, 100 S.Ct. 1287, 1293, 63 L.Ed.2d (1980). Many Ninth Circuit cases have similarly recognized the impropriety of dismissing an employee for engaging in political conduct that is protected by the

First and Fourteenth Amendments. See Gillette, 886 F.2d at 1197; Thomas v. Carpenter, 881 F.2d 828, 830 (9th Cir.1989), cert. denied, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612, --U.S.--, 110 S.Ct. 3236 111 L.Ed.2d 747 (1990). Since Erickson's right to support Griffies during the 1986 campaign unquestionably is deserving of constitutional protection, the first element of the Mt. Healthy test was satisfied.

The second element of the Mt. Healthy test requires that Erickson prove that her political support for Griffies was a substantial or motivating factor behind Ladenburg's decision to terminate her. In an attempt to carry this burden, Erickson offered nine circumstantial reasons supporting her claim that she was terminated solely for her political

beliefs. Erickson's evidence consisted of the following nine disputed facts:

1. Erickson was romantically involved with Griffies, and Ladenburg was aware of their relationship.
2. The Pierce County Sheriff made a negative appraisal of Erickson at a political meeting with Ladenburg, which Erickson claims suggests political motives for her termination.
3. The transition between Griffies and Ladenburg was often not friendly.
4. Ladenburg terminated Erickson's employment shortly after Ladenburg hired his own administrative assistant.
5. Erickson never received a

warning prior to her termination.

6. Ladenburg did not approve of Griffies's decision to have a romantic relationship with an employee.
7. Ladenburg was insensitive to employee's right to disagree with his plans and policies for the prosecutor's office.
8. Ladenburg believed the problems between Erickson and him were a byproduct of the emotionalism of the election.
9. Ladenburg terminated Erickson's employment without advance notice.

It is well established that a plaintiff need not prove allegations with direct evidence and circumstantial

evidence can be sufficient. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17, 103 S.Ct. 1478, 1482-83, 75 L.Ed.2d 403 (1983). Nonetheless, all of the above evidence merely suggests that Erickson was a Griffies supporter who was terminated, not that she was terminated because she was a Griffies supporter.

When asked why she believed she was discharged from the prosecutor's office, Erickson replied as follows:

> The reason I feel I was discharged because I supported Mr. Griffies is the fact that I was discharged. I was given a list of reasons why I was being discharged. I didn't have an opportunity to meet and discuss those reasons. I was being discharged. So to me--excuse

> me, so to my belief I was only being discharged because of politically supporting Mr. Griffies.

A thorough reading of the trial transcript reveals no additional evidence of Ladenburg's motives other than that cited by the parties above. The evidence simply does not support Erickson's claim that her political support for Griffies during the election was a substantial or motivating factor in Ladenburg's decision to terminate her. We hold that Erickson failed to satisfy the second element of the Mt. Healthy test and that the district court erred by not granting Pierce County's motion for judgment notwithstanding the verdict. Consequently, we need not consider whether Ladenburg has satisfied the third element

of the Mt. Healthy test.

III.

Erickson claims that the district court erred by dismissing her due process claim prior to trial. A grant of summary judgment is reviewed de novo. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 1416, 1421 (9th Cir.1989), cert. denied, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). The appellate court's review is governed by the same standard used by the trial court under Fed.R.Civ.P. 56(c). Darring v.Kincheloe, 783 F.2d 874, 876 (9th Cir.1986). The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive

law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d. 1338, 1339-40 (9th Cir.1989).

Erickson claims that Ladenburg deprived her of liberty interest without due process. Essentially, Erickson argues that when Ladenburg said it was improper for her to retain a high salary after transferring to the family support department, she suffered injury to her reputation because Ladenburg's statement implied that she was dishonest. She contends she was prevented from securing other employment with Pierce County. The district court was correct in finding no violation of liberty interest. The remark concerning being overpaid does not rise to the level of violating a liberty interest.

In light of the Ninth Circuit and Supreme Court case law on point, it is

clear that the district court did not err in dismissing Erickson's due process claim. Roth v. Veteran's Admin.,856 F.2d 1401, 1411 (9th Cir.1988) (employer who implied that employee could not get along well with others and would make a poor manager did not violate employee's liberty interest because statements did not foreclose employee's ability to practice his profession); Stretten v. Wadsworth Veterans Hospital, 537 F.2d. 361, 366 (9th Cir.1976) (no due process violation when employer charged employee with incompetence and claimed employee could not get along with others since these charges would not prevent the employee from practicing medicine). Since Erickson was free to continue in her career elsewhere as an administrative secretary, and since she was not stigmatized to the

point where she could not find work, the district court properly dismissed her due process claim.

WE REMAND FOR ENTRY OF JUDGMENT IN FAVOR OF PIERCE COUNTY AND LADENBURG. REVERSED IN PART; AFFIRMED IN PART.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONNA ERICKSON, Plaintiff-Appellee, vs. PIERCE COUNTY; JOHN LADENBURG, Defendants-Appellant	)	No. 90-35212 D.C. No. CV-87-736-T
DONNA ERICKSON, Plaintiff-Appellant, vs. PIERCE COUNTY; JOHN LADENBURG, Defendants-Appellees	)	No. 90-35228 D.C. No. CV-87-736-JET ORDER

Appeal from the United States District Court for the Western District of Washington

Before: HUG, NOONAN, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX 3

AMENDMENT [I] [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise hereof; or abridging the freedom of speech, or of the pres; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Dec. 29, 1979, P.L. 96-170, Sec. 1, 93 Stat. 1284.)

Supreme Court, U.S.
FILED
NOV 17 1992
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No. 92-764

In The

Supreme Court of the United States

October Term, 1992

DONNA ERICKSON,

Petitioner,

v.

PIERCE COUNTY and JOHN LADENBURG,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should exercise its discretionary authority to review the Ninth Circuit's decision that the evidence presented at trial was not sufficient to support a verdict in favor of Petitioner on her claim that she was dismissed from employment for a political reason in violation of the First Amendment, where the evidence showed that Petitioner tried to impede and hinder the operation of the office when the new prosecutor began to take over.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

A. Factual History 1

B. Procedural History 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 6

I. Petitioner Has Failed To Set Forth Any Special Or Important Reasons Why The Court Should Review The Ninth Circuit's Decision 7

A. The Federal Law Regarding First Amendment Restrictions On Employers Is Clear And Well-Defined; This Case Presents No Issue Which Requires Further Clarification From The Court 7

B. The Ninth Circuit Did Not Apply A "Substantial Or *Sole* Motivating Factor" Requirement In Conflict With The "Substantial Or *A* Motivating Factor" Requirement Of Other Federal Courts 8

C. The Ninth Circuit's Holding That, When Viewed In The Context Of The Entire Record, The Circumstantial Evidence In This Case Was Not Sufficient To Support A Verdict Against Respondents Does Not Conflict With The Decisions Of This Or Any Other Federal Court 12

TABLE OF CONTENTS – Continued

Page

D. Petitioner Incorrectly Asserts That The Second *Mt. Healthy* Element Of Proof Is Necessarily A Factual Issue Which Must Be Decided By A Jury In All Cases 19

E. The Ninth Circuit Did Not Misapply The Standard Of Review Of Judgments Notwithstanding The Verdict And Did Not Violate Petitioner's Seventh Amendment Right To A Jury Trial..... 23

F. Other Reasons Indicate That The Court Need Not Expend Its Time In Considering The Ninth Circuit's Decision In This Case..... 26

CONCLUSION 26

APPENDIX 1 (U.S. Const. amend. VII).....App. 1

TABLE OF AUTHORITIES

Page

CASES

Alaniz v. San Isidro Independent School Dist., 742 F.2d 207 (5th Cir. 1984) 16

Allen v. Scribner, 812 F.2d 426, *amended* 828 F.2d 1445 (9th Cir. 1987) 22

Anthony v. Sundlun, 952 F.2d 603 (1st Cir. 1991) 13

Branchick v. Commonwealth, Dept. of Labor & Industry, 496 Pa. 280, 436 A.2d 1182 (Pa. 1981) 15

Burgess v. Pierce County, 918 F.2d 104 (9th Cir. 1990) 16

Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982) *disagreed with by Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985), *disapproved by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) 22

Connell v. Sears, Roebuck & Co., 722 F.2d 1542 (Fed. Cir. 1983) 25, 26

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 21

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L. Ed. 2d 547 (1976) 7

Giacoletto v. Amax Zinc Corp., 954 F.2d 424 (7th Cir. 1992) 21

Gillette v. Delmore, 886 F.2d 1194 (9th Cir. 1989) 11, 19, 20

Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987) 21

Hudson v. Normandy School Dist., 953 F.2d 410 (8th Cir. 1992) 21

TABLE OF AUTHORITIES – Continued

Page

Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) 14

Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990) 13

Lowe v. Monrovia, 775 F.2d 998 (9th Cir. 1985) *amended*, 784 F.2d 1407 (9th Cir. 1986) 21

Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976) 23

Mays v. Williamson & Sons, Janitorial Services, Inc., 775 F.2d 258 (8th Cir. 1985) 21

Meyers v. City of Cincinnati, 934 F.2d 726 (6th Cir. 1991) 12, 20

Missouri National Education Ass'n v. New Madrid County R-1 School Dist., 810 F.2d 164 (8th Cir. 1987) 22

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977) ..... *passim*

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) 9, 15, 16

Parker v. Wallace, 596 F. Supp. 739 (M.D. Ala. 1984) 17

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) 23

Perry v. Larson, 794 F.2d 279 (7th Cir. 1986) 15

Price Waterhouse v. Hopkins, 490 U.S 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) 21, 22

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988) 14

Soderbeck v. Burnett County, 752 F.2d 285 (7th Cir.) *cert. denied*, 471 U.S. 1117 (1985) 14

TABLE OF AUTHORITIES – Continued

Page

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 21

Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989)..... 14

Tye v. Board of Education, 811 F.2d 315 (6th Cir.) *cert. denied*, 484 U.S. 924 (1987) 21

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1982) 21

Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992)..... 21

Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987) 14

CONSTITUTIONS, COURT RULES

U.S. Const. amend. I..... *passim*

U.S. Const. amend VII..... 23, 24, 25

Sup. Ct. R. 10 7

STATEMENT OF THE CASE

A. Factual History

The evidence admitted at trial showed that Petitioner, Donna Erickson, became the administrative assistant to Respondent Pierce County's prosecuting attorney in February, 1981. As the administrative assistant, she had an important role in the operation of the prosecutor's office, including supervisory duties over other employees, signing on new employees, ordering supplies, assisting in payroll and providing employee lists and budget information, among other duties.

Petitioner remained the administrative assistant to the prosecuting attorney through the transition when William Griffies was elected to the office in 1982. She acted as Griffies' administrative assistant throughout his term as Pierce County's Prosecuting Attorney. In addition, Petitioner and Mr. Griffies had a personal relationship, beginning before Griffies was elected as the prosecutor. When Griffies was up for re-election in 1986, he was defeated by Respondent Ladenburg.

There was also evidence admitted at trial showing that after he lost the election to Ladenburg, Griffies was unwilling to cooperate in an effort to coordinate a transition from him to the new prosecutor. Before he left office, Griffies transferred Petitioner to a different position within the prosecutor's office and gave her the same salary that she had been receiving as his administrative assistant, even though it was higher than the salary of all other employees in the same job. The salary was higher than the salary of those with considerably more experience and higher than the salary of her supervisor.

Because Mr. Griffies had been unwilling to cooperate in the transition, Ladenburg took office with virtually no information about the office's day-to-day operations or its personnel. He had no readily available means of obtaining this information because the two regular employees who had this knowledge – Petitioner and Mr. Griffies' personal secretary – both assumed new jobs. Since Petitioner was still employed in the prosecutor's office, Mr. Ladenburg asked her to continue with the functions she had been doing for the previous five years until his new administrative assistant could begin.

Evidence presented at trial showed that Petitioner knew she was the only one in the office who knew how to perform the administrative assistant's functions. However, she testified that she wanted nothing to do with Mr. Ladenburg and did not want to be involved in any aspect of his administration. Petitioner's attitude was reflected in her work performance. She repeatedly failed to complete the tasks given to her and was openly critical of Mr. Ladenburg. She removed and kept files from the administrator's office without informing anyone she had done so. She transferred the administrator's phone number to the office she used for her new job. She took and retained the checks and records to an account used by the prosecutor. She was uncooperative and hostile towards the changes the new prosecutor was trying to implement. Some of her acts jeopardized funding for the office.

On March 6, 1987, approximately two months into his term, Mr. Ladenburg dismissed Petitioner. In a letter to her, he set forth the specific reasons for the dismissal, which were:

(1) Since January you have displayed a poor attitude toward supervision by staff and have not fully co-operated in transition matters.

(2) Transition work was hindered by your failure to properly list and register new employees.

(3) Items such as extra hire lists and employee wage lists were not provided as requested or were incomplete.

(4) The administrative offices had essential files and documents removed.

(5) The phones for the administrative offices were transferred, creating location problems.

(6) You transferred to a position with lower responsibilities and kept your salary at a high level that is unjustified for that position.

(7) Your past position as administrative assistant and your relationship with employees causes continuing morale problems.

Although Petitioner emphasizes that her job performance during Griffies' term was satisfactory, it was her job performance and conduct after Ladenburg took over the office that was the reason for her dismissal.

Petitioner contended that she was dismissed because of her political support of and relationship with William Griffies. However, she admitted that she was never questioned about her political affiliation and that she was not

aware of any written document or verbal statement indicating political affiliation was a requirement for employment in the Ladenburg administration. She was not aware of any study or statistic relating employment in the Ladenburg administration to political affiliation. The only evidence on which Petitioner relied to support her claim was simply that she had an affiliation with Mr. Griffies and was discharged by Mr. Ladenburg.

Contrary to Petitioner's suggestion, there was no evidence or testimony presented that she was forced to do two different jobs at the same time. Her employment records were admitted at trial and they showed that she never put in more than her regular time in one day.

B. Procedural History

The district court judge, the Honorable Jack E. Tanner, denied Respondents' 12(b)(6) motion to dismiss and motion for summary judgment as to petitioner's First Amendment political patronage claim. Judge Tanner permitted a jury trial on this claim. At the close of Petitioner's case, Respondents moved for a directed verdict on the grounds that the evidence was insufficient to support a verdict in plaintiff's favor. Judge Tanner denied this motion.

Judge Tanner refused to permit Respondents to call witnesses who would have testified that no other employee who supported Mr. Ladenburg's political opponent was dismissed. Judge Tanner also refused to permit Respondents to call Petitioner's supervisor, who would have been critical of Petitioner's performance. In fact, Judge Tanner refused to permit Respondents to call any

witness other than Mr. Ladenburg himself to prove the conduct of Petitioner which led to her dismissal.

Before the case was submitted to the jury, Respondents renewed their motion for a directed verdict based on the sufficiency of the evidence. Judge Tanner denied this motion. The jury found in favor of petitioner and awarded her $25,000. Petitioner brought a post-trial motion seeking a new trial on the issue of damages and Respondents moved for judgment notwithstanding the verdict. Judge Tanner denied Respondents' motion for J.N.O.V. and granted a new trial on the issue of damages. Following the second trial, the jury awarded petitioner $75,000 and Judge Tanner awarded her an additional $109,925.50 as attorneys' fees and $5,992.84 in costs.

Respondents asked the Ninth Circuit Court of Appeals to review Judge Tanner's evidentiary rulings refusing to permit Respondents to present evidence, to review his rulings on Respondents' motions regarding the sufficiency of petitioner's evidence, to review his granting a new trial on damages and to review his attorney fee award. After examining the evidence, the Ninth Circuit reversed and remanded for entry of judgment in favor of Respondents on the grounds that the evidence presented at trial was insufficient to prove Petitioner's political association with Griffies was a substantial or a motivating factor in her dismissal.[1] (Pet. for Cert., App. 1.)

---

[1] The Ninth Circuit's decision made it unnecessary for the court to decide the other issues raised by Respondents on appeal.

None of the three Ninth Circuit judges hearing the case dissented and the decision was unanimous. Petitioner sought a rehearing, which the Ninth Circuit denied. (Pet. for Cert., App. 2.) Petitioner suggested a rehearing en banc, which the Ninth Circuit also denied.

SUMMARY OF THE ARGUMENT

No reason exists for the Court to exercise its discretionary jurisdiction to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit's decision does not conflict with any decision of this Court or of another United States court of appeals and does not decide any important question of federal law which needs to be settled by this Court. The Ninth Circuit's decision that the district court erred by not granting Respondents' motion for judgment notwithstanding the verdict rests on its examination of the sufficiency of the evidence presented at trial. There is no special or important reason why this Court should re-examine the record to re-determine the sufficiency of the trial evidence.

ARGUMENT

Petitioner seeks to have the Court re-examine the record without setting forth any special or important reason why the Court should exercise its discretionary jurisdiction to do so.

I. Petitioner Has Failed To Set Forth Any Special Or Important Reasons Why The Court Should Review The Ninth Circuit's Decision.

Considerations governing this Court's review on writ of Certiorari are set forth in Supreme Court Rule 10. Petitioner has failed to set forth any special or important reasons why the Court should review the judgment of the Ninth Circuit.

A. The Federal Law First Amendment Restrictions On Employers Is Clear And Well-Defined; This Case Presents No Issue Which Requires Further Clarification From The Court.

This case presents no important question of federal law which has not been settled by the Court. The Court has previously considered and clearly defined the law pertaining to First Amendment claims for violation of the right of political association in the context of public employment: (1) there must be a violation of First Amendment rights, and (2) the encroachment must not be justified by a legitimate state interest of vital importance. *Elrod v. Burns*, 427 U.S. 347, 360-62, 96 S.Ct. 2673, 1683-84, 49 L. Ed. 2d 547 (1976).

The Court has also previously considered and clearly defined the elements of proof of a First Amendment violation in the context of continued employment: (1) the employee must show that his/her conduct was constitutionally protected, (2) the employee must prove that his/her conduct was a "substantial factor" or a "motivating factor" in the employer's decision to terminate the

employment; and (3) if the first two elements are satisfied, the burden shifts to the employer to show that it would have reached the same decision regarding employment even in the absence of the protected conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L. Ed. 2d 471 (1977).

Petitioner and Respondents agree that the law expressed in *Mt. Healthy* governs this case. The parties' dispute, both in the trial court and in the circuit court of appeals, was whether the evidence presented at trial was sufficient to meet Petitioner's burden of proof. Both Petitioner and Respondents briefed and argued the sufficiency of the evidence presented at the trial before the Ninth Circuit. Respondents argued, and the Ninth Circuit agreed, that the evidence presented at trial was not sufficient to show Petitioner's political support of Griffies was a substantial or a motivating factor in her dismissal. Petitioner failed to cooperate with the transition and affirmatively attempted to hinder Ladenburg's operation of the prosecutor's office. Her obstructionist conduct is not protected by the First Amendment to the U.S. Constitution.

The issues presented to the Ninth Circuit and now represented to this court are highly factual in nature. These fact-oriented issues are particular to the dispute between Petitioner and Respondents alone and will not affect any other present or future case.

B. The Ninth Circuit Did Not Apply A "Substantial Or *Sole* Motivating Factor" Requirement In Conflict With The "Substantial Or *A* Motivating Factor" Requirement Of Other Federal Courts.

Petitioner argues that the Ninth Circuit applied the wrong standard by requiring her to prove her constitutionally protected association with Griffies was the "sole"

motivating factor in her dismissal.[2] The Ninth Circuit's opinion on its face shows that it applied the same standard as it and other courts have applied.

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[2] It should be noted that even though a First Amendment plaintiff's prima facie case requires proof that constitutionally protected conduct was "a" substantial or "a" motivating factor in an adverse employment action, it is nevertheless true that – even if protected conduct was a factor – it is a defense to the action if the employer proves that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

> The *Mt. Healthy* test allows a defendant to terminate an employee for any legitimate reason, *even where, as in Mt. Healthy itself, a reason violative of the First Amendment was also a substantial or motivating factor.*

Nekolny v. Painter, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (emphasis added).

Consequently, there can be no recovery under the First Amendment unless the protected conduct was the sole factor in the adverse employment action:

> Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.
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> . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should

Petitioner's argument is based on the Ninth Circuit's use of the word "solely" in its opinion in two places. Petitioner has taken the use of this word out of context. Both times the Ninth Circuit used this word, it was merely summarizing Petitioner's contentions:

> Erickson disputes the reasons cited by Ladenburg. *She contends that* her employment was terminated solely because she had supported Griffies during the 1986 election.[3]
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> . . .
>
> The second element of the Mt. Healthy test requires that Erickson prove that her political support for Griffies was a substantial or motivating factor behind Ladenburg's decision to terminate her. In an attempt to carry this burden, Erickson offered nine circumstantial reasons supporting *her claim that* she was terminated solely for her political beliefs.[4]

> not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 285-86.

[3] 960 F.2d at 804 (Pet. for Cert., p. 8a) (emphasis added).

[4] 960 F.2d at 805 (Pet. for Cert., pp. 13a-14a) (emphasis added).

Thus, the Ninth Circuit used the term "solely" only to describe Petitioner's contentions. This was, in fact, what Petitioner contended.

Despite Petitioner's contentions, the Ninth Circuit applied the correct standard:

> Terminations that allegedly violate the First and Fourteenth Amendments are subjected to a three-part test to determine whether constitutional rights have been violated. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). . . . Second, the employee must prove that the constitutionally protected conduct was *a substantial or motivating factor* behind the termination.[5]
>
> . . .
>
> The second element of the *Mt. Healthy* test requires that Erickson prove that her political support for Griffies was *a substantial or motivating factor* behind Ladenburg's decision to terminate her.[6]

Moreover, the Ninth Circuit's holding leaves no doubt that it applied the correct legal standard:

> A thorough reading of the trial transcript reveals no additional evidence of Ladenburg's motives other than that cited by the parties above. The evidence simply does not support Erickson's claim that her political support for Griffies during the election was *a substantial or*

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[5] 960 F.2d at 804 (Pet. for Cert., p. 11a) (emphasis added).

[6] 960 F.2d at 805 (Pet. for Cert., p. 13a) (emphasis added).

> *motivating factor* in Ladenburg's decision to terminate her. We hold that Erickson failed to satisfy the second element of the *Mt. Healthy* test and that the district court erred by not granting Pierce County's motion for judgment notwithstanding the verdict.[7]

Thus, the Ninth Circuit applied the same standard as this Court and other federal courts and there is no conflict for this Court to resolve.

C. The Ninth Circuit's Holding That, When Viewed In The Context Of The Entire Record, The Circumstantial Evidence In This Case Was Not Sufficient To Support A Verdict Against Respondents Does Not Conflict With The Decisions Of This Or Any Other Federal Court.

The Ninth Circuit expressly considered both the circumstantial evidence Petitioner points to and most of the case law Petitioner cites. It determined that this circumstantial evidence, in light of the other evidence presented at trial, was insufficient to support a verdict against Respondents. This decision does not conflict with any decision of this Court or of another United States circuit court of appeals.

The decisions Petitioner cites involved much stronger evidence than the slight and wholly circumstantial evidence presented by Petitioner. In *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991), the evidence that the employee's demotion was motivated by his free speech

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[7] 960 F.2d at 805 (Pet. for Cert., p. 17a) (emphasis added).

on affirmative action plans was so strong that the court was able to determine as a matter of law that the employee was forced to retire because of the negative opinions he was believed to have about affirmative action. 934 F.2d at 739.

In *Anthony v. Sundlun*, 952 F.2d 603 (1st Cir. 1991), the new Democratic governor's chief of staff asked for a list of all state employees at a jai alai fronton a few days before the season opened. There were thirteen positions, ten of which were currently filled. The chief of staff consulted members of the Democratic party concerning potential appointees and, on the day before the season opened, advised the hiring agency of thirteen persons who were to take the thirteen positions – twelve of whom were Democrats and the thirteenth a close personal friend of the chief of staff's. All of the persons who had previously occupied the positions were dismissed. 952 F.2d at 603.

In *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990), there was evidence that, shortly before taking office, the newly-elected district attorney told department employees who had supported the former district attorney that he did not intend to retain them as employees. 914 F.2d at 1393. There was also evidence that the newly-elected attorney also blamed the dismissal of one employee on the funding agency and a lack of funds although he himself made the decision and it was undisputed that there were sufficient funds to retain the employee, that he caused the dismissal without ever contending that job performance was in some way inadequate, that he rejected the employee for another vacant position and instead hired his own political affiliate, and

that he fired a total of eleven people who had worked for his predecessor and replaced them with his own political supporters. *Id.* at 1393-94.

In *Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988), there was evidence that the employee had become involved in a series of disputes with the hospital management, that the hospital's clinical director sent a memorandum warning the employee that he was not authorized to speak out on certain matters, and that the hospital administration did not suggest the employee's conduct was deficient until after he began publicly criticizing the hospital. 846 F.2d at 1212.

In *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987), the plaintiff filed administrative complaints against the employer for Title VII violations and there was evidence that during the pendency of these complaints his supervisors began transferring his job duties and giving him sub-average performance ratings. 809 F.2d at 1376.

In *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir.) *cert. denied*, 471 U.S. 1117 (1985), the first thing the newly elected Sheriff did upon taking office was to fire the wife of the former Sheriff. 752 F.2d at 287. (There is a significant difference between evidence that a person was fired immediately upon the new official's taking office – *i.e.* before he or she is given a chance to perform his or her job for the new official – and firing a person after two months of unsatisfactory performance, as was the case with Petitioner.)

In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the acting sheriff, a Republican, terminated the employment of a deputy who was a Democrat by handing him a letter

that read, "I feel that since you have been campaigning against me I must in all good faith to the Republican Party and myself release you from duty." The defense did not raise any question as to the adequacy of the Deputy's performance. 727 F.2d at 1329.

In *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), there was no factual issue because the defendant admitted that the plaintiff's political affiliation was a substantial or motivating factor in his decisions banning the plaintiff from certain duties. 881 F.2d at 830.

These cases are consistent with the Ninth Circuit's decision below. They differ only insofar as the facts surrounding the employment action in these cases differ from the facts surrounding Petitioner's discharge. Unlike the cases she cites, Petitioner presented no evidence of a connection between her dismissal and her affiliation with the former prosecutor beyond the bare fact of the affiliation itself. The circuit courts of appeal have been consistent in holding that the bare fact of affiliation with a former, defeated elected official is not sufficient to prove a First Amendment violation. *Branchick v. Commonwealth, Dept. of Labor & Industry*, 496 Pa. 280, 436 A.2d 1182, 1184 (Pa. 1981); *Nekolny v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

Other cases demonstrate what kind of evidence is sufficient to show an adverse employment action was taken in violation of an employee's First Amendment rights: In *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), there was corroborated testimony that the successful candidate had made a threatening remark about the

employee's continued employment shortly after the candidacy was announced, there was a five day suspension without a hearing, there was a letter chastising the employee for taking an over-long lunch for being one minute too long, and there was an offer by the candidate that if the employee dropped out of the race, both the suspension and discharge would be dropped. 794 F.2d at 283.

In *Alaniz v. San Isidro Independent School Dist.*, 742 F.2d 207 (5th Cir. 1984), there was evidence of a long history of political patronage in a rural school district, there was evidence that the first day after a new election the new Board president demanded the employment contracts of all employees, the evidence showed that shortly thereafter the plaintiff was dismissed along with many others, and there was evidence that the plaintiff, who had twenty years experience in her bookkeeping position, was replaced by a man with only a high school education and no bookkeeping experience. 742 F.2d at 208-09.

In *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied* 455 U.S. 1021 (1982), there was evidence that the three plaintiffs were dismissed shortly after the new Township Supervisor took office, that one of the defendants' agents told the plaintiffs that the new Supervisor wanted to terminate them because they had campaigned against her, that one of the plaintiffs was replaced by a person who had worked in the new Supervisor's campaign. 653 F.2d 1168.

In *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990), there was evidence that an employer did not permit an employee who opposed proposed ordinance standards

relating to fire safety to attend public meetings on the ordinance, that the employer restricted what the employee could say at meetings he was permitted to attend, that the day after the employee sought a legal opinion in this dispute he was told that a county executive was considering terminating his employment for speaking to persons in the Prosecutor's and Executive's Office, and that he would be terminated if he continued to have contact with the County Prosecutor's Office or the County Council. 918 F.2d at 106 n.4.

In *Parker v. Wallace*, 596 F. Supp. 739 (M.D. Ala. 1984), the governor of Alabama fired a license inspector. There was evidence of a pattern of patronage in the hiring and firing of persons in the plaintiff's position, that the governor relied solely on his campaign coordinator's recommendation to dismiss the plaintiff, that the recommendation did not refer to the plaintiff's job performance but only to political loyalty of the replacement and the defendant raised poor job performance as a justification only after litigation commenced. 596 F. Supp. at 42-43.

When viewed against these cases where there was sufficient evidence to prove conduct protected by the First Amendment was a substantial or motivating factor in an employee's dismissal, it becomes clear that the circumstantial evidence presented at trial by Petitioner was extremely weak. Unlike these cases, there was no evidence connecting Petitioner's discharge with any political affiliation: there was no termination letter or evidence from any witness suggesting she was discharged for political reasons; there was no evidence of widespread discharge of employees and appointment of

political supporters; there was no evidence of participation by a political party or campaign coordinators; there was no evidence of prior attempts to suppress Petitioner's speech/political support of Griffies or threats, express or implied, or threats of retribution for the same; etc.

To the contrary, there was evidence admitted at trial putting Petitioner's discharge in context of her conduct after Griffies was defeated. Substantial evidence showed that this was far from a case where an employee was dismissed for no reason other than political affiliation. Petitioner was acting as an instrument of Mr. Griffies' discontent. She refused to do the tasks Ladenburg requested her to do during the transition and she affirmatively interfered with the operation of the prosecutor's office. Respondent Ladenburg did not dismiss Petitioner when he took office. He originally let her remain in the Prosecutor's Office. She was not dismissed until two months later and only after she had refused to perform tasks necessary to keep the office running efficiently during the transition and after she engaged in conduct obstructive to the office.

The Ninth Circuit's determination that, in light of all the evidence in the whole record, Petitioner's circumstantial evidence was legally insufficient to support a verdict against Respondents does not conflict with the cases Petitioner cites or other cases where a political patronage dismissal in fact happened. The Ninth Circuit considered the evidence and arguments Petitioners now put before this court and there is no reason why this court should reconsider the same.

D. Petitioner Incorrectly Asserts That The Second *Mt. Healthy* Element Of Proof Is Necessarily A Factual Issue Which Must Be Decided By A Jury In All Cases.

Petitioner asserts that the second *Mt. Healthy* element of proof, the "substantial or motivating factor" requirement, is necessarily an issue which must be decided by a jury. The authorities cited by Petitioner do not support this assertion. In fact, in one of them, *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989), the Ninth Circuit affirmed a summary judgment dismissal of a claim for failure to present sufficient evidence to raise an issue of fact on the second *Mt. Healthy* element.

Petitioner misrepresents *Gillette v. Delmore* by citing the decision as authority for the proposition that motivation is a factual issue, and implying that summary judgment is never appropriate on the second ("substantial or motivating factor") *Mt. Healthy* element of proof.[8] First, the Ninth Circuit did not hold that there was a factual issue as to the "substantial or motivating factor" element of proof which could not be resolved on summary judgment. The plaintiff in *Gillette*, a city-employed fireman, alleged that he was discharged as a result of his constitutionally protected comments during involuntary emergency medical treatment of a person which he believed constituted excessive force by the police. As to this charge, the city admitted the incident was a substantial factor in his discharge. 886 F.2d at 1198. The Ninth Circuit

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[8] Pet. for Cert, p. 15.

reversed the summary judgment in favor of the city on the grounds that there were factual issues as to the third *Mt. Healthy* element of proof (*i.e.* the defendant's burden of proving the discharge would have occurred despite the protected activity). *Id.*

Second, as to the fireman's additional allegation that he was discharged for his constitutionally protected political activities concerning the city budget, the Ninth Circuit affirmed the district court's summary judgment in favor of the defendant city on the grounds that the fireman had failed to present sufficient evidence as to the second *Mt. Healthy* element of proof:

> The allegations Gillette makes are not sufficient to meet his burden in opposing summary judgment. There is no evidence that any of his political activities or views caused, or were a substantial factor in, his termination.

Id. at 1199. Thus, *Gillette* is not authority for Petitioner's assertion that the "substantial or motivating factor" element is necessarily a factual issue which cannot be determined as a matter of law. It is itself a decision involving a determination of insufficient evidence on the second *Mt. Healthy* element of proof. The Ninth Circuit's decision in the case at bar is entirely consistent with the *Gillette* decision.

As *Gillette* demonstrates, even though an employer's motivation is purely factual in nature, it can be determined as a matter of law where there is no room for reasonable minds to differ. *See also Meyers v. City of Cincinnati*, 934 F.2d at 729.

Nor do any of the other cited cases support Petitioner's assertion that, on the facts of this case, the sufficiency of the evidence could not be determined as a matter of law where the evidence is too slight to justify a verdict.

Many of the cases Petitioner cites in her petition for certiorari involved no First Amendment claim. *See, e.g. Price Waterhouse v. Hopkins*, 490 U.S 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (claim under 42 U.S.C. § 2000e for sex discrimination); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed. 2d 403 (1982) (claim under 42 U.S.C. § 2000e for race discrimination); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (claim under 42 U.S.C. § 2000e for sex discrimination); *Giacoletto v. Amax Zinc Corp.*, 954 F.2d 424 (7th Cir. 1992) (claim under 29 U.S.C. § 621 for age discrimination); *Hudson v. Normandy School Dist.*, 953 F.2d 410 (8th Cir. 1992) (claim under 29 U.S.C. §§ 621 for age discrimination); *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992) (claim under 29 U.S.C. § 623(a) for age discrimination); *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) (claim under 42 U.S.C. § 2000e and 29 U.S.C. § 621 for sex and age discrimination); *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987) (claim under 29 U.S.C. § 621 for age discrimination); *Tye v. Board of Education*, 811 F.2d 315 (6th Cir.) *cert. denied*, 484 U.S. 924 (1987) (claim under 42 U.S.C. § 2000e for sex discrimination); *Mays v. Williamson & Sons, Janitorial Services, Inc.*, 775 F.2d 258 (8th Cir. 1985) (claim under 42 U.S.C. § 2000e for sexual harassment and retaliatory discharge); *Lowe v. Monrovia*, 775 F.2d 998 (9th Cir. 1985) *amended*, 784 F.2d 1407 (9th Cir. 1986) (claim

under 42 U.S.C. §§ 1981, 1983, 2000e for sex and race discrimination); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982) *disagreed with by Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985), *disapproved by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (claim under 42 U.S.C. § 2000e for retaliation following an employment discrimination complaint). Since no First Amendment claim was at stake, the courts in these decisions did not discuss whether the evidence before them was sufficient to support a verdict on a First Amendment claim.

Of the decisions relied upon by Petitioner which did involve a First Amendment claim, many did not discuss the issue of the sufficiency of evidence on the second *Mt. Healthy* element of proof which is at issue in the case at bar. *See, e.g. Allen v. Scribner*, 812 F.2d 426, 434-36, *amended* 828 F.2d 1445 (9th Cir. 1987) (court's discussion and holding related to third *Mt. Healthy* element of proof); *Missouri National Education Ass'n v. New Madrid County R-1 School Dist.*, 810 F.2d 164 (8th Cir. 1987) (no discussion of sufficiency of evidence to prove any element of prima facie case). In these cases, the "substantial or motivating factor" element of proof was not discussed. They provide no reason why this Court should review the Ninth Circuit's decision.

The cases cited by Petitioner where the evidence was sufficient to establish protected conduct was a substantial or motivating factor in the dismissal of an employee all involved much more substantial evidence than the evidence presented by Petitioner. *See, e.g. Allen v. Scribner*, 812 F.2d at 434-35 (evidence presented showed employer's officials had made comments that the plaintiff

employee was a "troublemaker" and should be removed from his position because he expressed critical opinions to the media which the officials did not approve of); *Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) (letter from department head to university president recommended suspension of tenured professor on grounds that the professor's public statements to the press were falsely critical of members of the University community); *Mabey v. Reagan*, 537 F.2d 1036, 1044 n. 9 (9th Cir. 1976) (one of the stated reasons for dismissal was arguably eligible for First Amendment protection).

Most importantly, these cases have virtually no factual similarities with the case at bar and are of virtually no relevance to the issue of the factual sufficiency of the evidence presented at the trial in this case to support the verdict in Petitioner's favor. Unlike the cases Petitioner relies upon, Petitioner presented no evidence that her protected political speech was the reason for her dismissal. In circumstances such as these, determination of the second *Mt. Healthy* element of proof may properly be made as a matter of law based on the insufficiency of Petitioner's evidence.

E. The Ninth Circuit Did Not Misapply The Standard Of Review Of Judgments Notwithstanding The Verdict And Did Not Violate Petitioner's Seventh Amendment Right To A Jury Trial.

The standard of review applied by the Ninth Circuit is set forth in the court's written opinion:

> Challenges to the sufficiency of the evidence, and the denial of a motion for judgment notwithstanding the verdict, are reviewed de novo to determine if the plaintiff's claims were supported by substantial evidence. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059, 88 L. Ed. 2d 778, 106 S. Ct. 802 (1986). It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Transgo*, 768 F.2d at 1014; *accord Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985) (directed verdict is "inappropriate if there is substantial evidence to support a verdict for the non-moving party"), *cert. denied*, 475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986).

960 F.2d at 804 (Pet. for Cert., p. 10a). Petitioner cites no authority suggesting that this standard of review is inappropriate. Petitioner cites different decisions setting forth the standard of review, but does not identify how these decisions indicate a standard of review which conflicts with the one applied by the Ninth Circuit. Nor does Petitioner identify any other reason why the Court should review the Ninth Circuit's decision.

The standard of review applied by the Ninth Circuit is consistent with the Seventh Amendment. The Seventh Amendment right to a jury trial expressly permits courts of the United States to re-examine facts tried by a jury in accordance with the rules of the common law. (Appendix 1) Directed verdicts and judgments notwithstanding the verdict, as procedural safeguards insuring the parties and the system against improper outcomes, have long been a

feature of the common law. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983). Petitioner cites no authority indicating that a circuit court violates a litigant's Seventh Amendment right to a jury trial by correcting a district court's error in failing to grant a judgment notwithstanding a verdict which should have been granted. Petitioner merely repeats ad nauseam rules about the standard of review of a motion for judgment notwithstanding the verdict, all of which are consistent with the Ninth Circuit's review.

Petitioner contends that there was sufficient evidence to support the verdict in her favor, but the Ninth Circuit reviewed the evidence she identifies and determined that it was not legally sufficient to support a verdict. *Connell v. Sears, Roebuck & Co., supra*, the authority relied upon by Petitioner, makes it clear that:

> Deference due a jury's fact findings in a civil case is not so great, however, as to require acceptance of findings where, as here, those findings are clearly and unquestionably not supported by substantial evidence. To so hold would be to render a trial and the submission of evidence a farce.
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> . . . If the facts found on substantial evidence be insufficient to support or contrary to a jury's legal conclusion, or if the facts found, though they would be capable of supporting the legal conclusion, were based on evidence less than substantial, a judge may, following the guidelines set forth above, grant the motion.

722 F.2d at 1546. The Ninth Circuit's decision that the evidence presented by Petitioner was insufficient to support the jury's verdict is consistent with this rule of *Connell v. Sears*.

F. Other Reasons Indicate That The Court Need Not Expend Its Time In Considering The Ninth Circuit's Decision In This Case.

There was no dissent in the Ninth Circuit's decision. Petitioner's request for a rehearing was denied. Petitioner's suggestion of a rehearing en banc was also denied. The Ninth Circuit does not perceive an inconsistency with its own decision or with decisions of other federal courts.

There are also other reasons supporting the Ninth Circuit's judgment. There was substantial evidence of legitimate grounds for dismissing Petitioner. There was considerable intervention by the district court which prejudiced Respondents, including onerous exclusions of relevant evidence and witnesses and manipulation of verdicts, which likely would have caused the Ninth Circuit to reach the same decision.

CONCLUSION

Petitioner calls poor attitude, moving phone lines and files, poor performance in job duties and causing morale problems "petty and amorphous."[9] Respondents

[9] Pet. for Cert., p. 23.

call this conduct unprotected by the First Amendment and legitimate reason for her dismissal.

There is no need for the Court to re-review this case. The Court has previously defined the law pertaining to First Amendment claims for violation of the right of political association in the context of public employment. The Court has previously defined the elements and burden of proof in political patronage cases. The Ninth Circuit followed the Court's decisions and rendered its decision in this case after reviewing the entire record.

The Ninth Circuit's decision that the evidence presented by Petitioner was insufficient to support a verdict in her favor was unanimous. Its decision does not conflict with the decisions of other courts cited by Petitioner. It did not fail to consider the evidence Petitioner identifies, but merely held that the evidence was not sufficient in this case. The Ninth Circuit's denial of Petitioner's request for a rehearing and suggestion of en banc review were denied, indicating that the Ninth Circuit does not perceive a conflict with any other court.

Petitioner has failed to set forth any special or important reason why the Court should exercise its discretionary jurisdiction to review the judgment of the Ninth Circuit in this matter. Consequently, the Court should

enter an order denying the petition for a writ of certiorari.

Respectfully submitted,

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AMENDMENT VII [1791].

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.